STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2011
V	No. 295929 Isabella Circuit Court
LARRY JERARD MACK, Defendant-Appellant.	LC No. 2009-001512-FH

Before: METER, P.J., and SAAD and WILDER, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of felonious assault, MCL 750.82, three counts of fourth-degree child abuse, MCL 750.136b(7)[1], reckless driving, MCL 257.626, and failure to stop at the scene of an accident, MCL 257.620. Defendant was sentenced, as a third habitual offender, MCL 769.11, to concurrent terms of 34 months to eight years in prison for the assault conviction, one year for each child abuse conviction, 93 days for the reckless driving conviction, and 90 days for the failure to stop conviction. We affirm.

Testimony at trial established that, on July 28, 2009, defendant and his fiancée got into an argument that began before his fiancée went to work and resumed when she returned to their residence. Later in the evening, defendant left to get cigarettes, taking his fiancée's car as well as her cell phone. Approximately an hour later, defendant's fiancée took her three children and left the house on foot, stopping at a nearby house to call her mother and father for help. Defendant's fiancée's parents drove to pick up their daughter and grandchildren, and in the process, were seen and then followed somewhat aggressively by defendant, who was still driving his fiancée's vehicle. Being fearful of the circumstances, defendant's fiancée had been hiding with the children in some bushes by the side of the road, and when she and the children were finally able to get into her parent's car, defendant chased the vehicle and attempted run the parents' car off the road, eventually striking their vehicle. During the trial, after testimony on the principal offenses, the prosecution was permitted, over defendant's objection, to question the

[1] Previously MCL 750.136b(5).

fiancée about an earlier incident in which defendant allegedly choked her and pushed her out of her car while the two sat in a parking lot.

On appeal, defendant argues that MCL 768.27b, pursuant to which the trial court permitted the prosecution to introduce defendant's prior act of domestic violence against his fiancée as propensity evidence, directly conflicts with MRE 404(b), and thus violates the separation of powers doctrine. Const 1963, art 6, §5.

> "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Otherwise, we review for abuse of discretion a trial court's decision to admit evidence. *Id*. at 670. [*People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007).]

We review constitutional issues de novo. *People v Patton*, 285 Mich App 229, 236; 775 NW2d 610 (2009).

MCL 768.27b(1) provides in pertinent part:

> [I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

As the parties acknowledge, this provision directly contradicts the question of whether other act evidence may be used as propensity evidence under MRE 404(b)[2]. *Pattison*, 276 Mich App at 615. Defendant acknowledges that his argument was specifically addressed and rejected in *People v Schultz*, 278 Mich App 776, 779; 754 NW2d 925 (2008), wherein the panel held:

> *Pattison* . . . controls our analysis of defendant's separation of powers argument. As with MCL 768.27a, which was the statute at issue in *Pattison*, the Legislature passed MCL 768.27b in reaction to the judicially created standards in MRE 404(b). It does not impose upon the administration of the courts; rather, it reflects a "policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords." *Pattison*, [276 Mich App] at

---

[2] MRE 404(b)(1) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

620. Therefore, in keeping with the analysis in *McDougall v Schanz*, 461 Mich 15, 31-32, 36-37; 597 NW2d 148 (1999), the statute is a substantive rule engendered by a policy choice, and it does not interfere with our Supreme Court's constitutional authority to make rules that govern the administration of the judiciary and its process.

Defendant further acknowledges that this Court is bound by *Schultz*, MCR 7.215 (J)(1), but argues that this Court should disagree with *Schultz* and declare a conflict panel. We decline to do so. Rather, we adopt the analysis in *Shultz* and *Pattison*. As this Court held in *Pattison*, when addressing MCL 768.27a:

> Defendant also argues that the statute violates the separation of powers because it amounts to legislative intrusion on the province of our Supreme Court, as set forth in the Michigan Constitution, Const 1963, art 6, §5, to establish rules of practice and procedure for the administration of our state's courts. We agree that the Legislature may not enact a rule that is purely procedural, i.e., one that is not backed by any clearly identifiable policy consideration other than the administration of judicial functions. *McDougall* [461 Mich at 29-31]. However, rules of evidence are not always purely procedural, and may have legislative policy considerations as their primary concern. *Id*. at 33-34.
>
> In this case, MCL 768.27a is a substantive rule of evidence because it does not principally regulate the operation or administration of the courts. *Id*.; see also *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 191; 732 NW2d 88 (2007). Instead, it reflects the Legislature's policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords. Naturally, a full and complete picture of a defendant's history will tend to shed light on the likelihood that a given crime was committed. However, the risk that a defendant would suffer undue prejudice from the exposition of his or her past misdeeds has led the judiciary, as a matter of policy, to exclude most of this information from a jury's consideration. The decision to enact a statute like MCL 768.27a and to allow this kind of evidence in certain cases reflects a contrary policy choice, and it is no less a policy choice because it is contrary to the choice originally made by our courts. See [*People v Sabin (After Remand)*, 463 Mich 43, 61 n 8; 614 NW2d 888 (2000).] Therefore, MCL 768.27a is substantive in nature, and it does not violate the principles of separation of powers. [*Pattison*, 276 Mich App at 619-620.]

Defendant further argues that the drafters of Michigan's constitution intended to leave "ordinary" rules of evidence to our Supreme Court, not the Legislature, when they drafted Const 1963, art 6, §5. However, this argument does not afford defendant an avenue for relief because the essence of his argument is that *McDougall* was wrongly decided. As we have already noted, this Court is bound by *McDougall*.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Kurtis T. Wilder